No. 15852

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, A CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANT

GEORGE COCHRAN DOUB,
Assistant Attorney General,

C. E. LUCKEY,
United States Attorney,

ALAN S. ROSENTHAL,
Attorney, Department of Justice,
Washington 25, D. C.

FILED
APR 14 1958
PAUL P. O'BRIEN, CLERK

INDEX

	Page
Jurisdictional statement	1
Statement of the case	2
Specification of errors relied upon	11
Statutes involved	12
Argument	13
Introduction and summary	13
I. The holding below that the Government had the burden of disproving the correctness of appellee's charges is contrary to *United States* v. *New York, New Haven and Hartford R. Co.*, 355 U. S. 253	17
II. The undisputed evidence clearly establishes that the shipments were entitled to land-grant rates	23
A. The critical inquiry under Section 321 (a) of the Transportation Act is whether at the time of rail movement, the shipments were military or naval property intended for a military or naval use	23
B. The shipments were military or naval property and were intended for a military or naval use	28
III. The Government complied with the condition in the export tariff that specific destination beyond Pacific Coast port of export be shown	39
Conclusion	48
Appendix	49

CITATIONS

Cases:

American Ry. Express Co. v. *Price Bros.*, 54 F. 2d 67 (C. A. 5)	42
Boone v. *United States*, 109 F. 2d 560 (C. A. 6)	42
Carpenter v. *Texas & New Orleans R. Co.*, 89 F. 2d 274 (C. A. 5)	42
Chesapeake & Ohio Ry. Co. v. *United States*, 1 F. Supp. 350 (E. D. Va.)	42

Cases—Continued Page

Chicago and North Western Ry. Co. v. *United States*, 74 F. Supp. 943 (C. Cls.) 34, 38

Great Northern Ry. Co. v. *Delmar Co.*, 283 U. S. 686 41

International Milling Co. v. *Lowden*, 91 F. 2d 270 (C. A. 8) 42

National Carloading Corp. v. *United States*, 221 F. 2d 81 (C. A. D. C.) 38

Northern Pacific Ry. Co. v. *United States*, 101 F. Supp. 29 (D. Minn.) 25

Northern Pacific Ry. Co. v. *United States*, 330 U. S. 248 26, 29, 33, 34, 36, 37, 38

Pennsylvania R. Co. v. *United States*, 125 F. Supp. 233 (C. Cls.) 28, 35

Raymond City Coal Corp. v. *New York Central Ry. Co.*, 103 F. 2d 56 (C. A. 6) 42

Sonken-Galamba Corp. v. *Union Pacific R. Co.*, 145 F. 2d 808 (C. A. 10) 23, 26

Southern Pacific Co. v. *Lothrop*, 15 F. 2d 486 (C. A. 9) 42

Southern Pacific Co. v. *United States*, 67 F. Supp. 966 (C. Cls.) 27, 34, 35

Southern Pacific Co. v. *Defense Supplies Corp.*, 64 F. Supp. 605 (N. D. Cal.), affirmed, subnom. *Southern Pacific Co.* v. *Reconstruction Finance Co.*, 161 F. 2d 56 (C. A. 9) 27, 28, 32, 37

Union Pac. R. Co. v. *United States*, 132 F. Supp. 230 (C. Cls.) 46, 47

Union Wire Rope Corp. v. *Atchison, T. & S. F. Ry. Co.*, 66 F. 2d 965 (C. A. 8) certiorari denied, 290 U. S. 686 42

United States v. *Gulf Refining Co.*, 268 U. S. 542 42

United States v. *Interstate Commerce Commission*, 198 F. 2d 958 (C. A. D. C.) 42

United States v. *Missouri Pacific R. Co.*, 250 F. 2d 805 (C. A. 5) 21, 22, 23

United States v. *New York, New Haven & Hartford R. Co.*, 355 U. S. 253 15, 16, 17, 21

United States v. *Powell*, 330 U. S. 238 27, 34, 36

United States v. *Strickland Transportation Co.*, 200 F. 2d 234 (C. A. 5) 42

War Materials Reparation Cases, 294 I. C. C. 5 42

Willingham v. *Seligman*, 179 F. 2d 257 (C. A. 5) 42

Statutes:

Page

Act of December 12, 1945, 59 Stat. 605 (effective October 1, 1946) ... 12

Interstate Commerce Act, 49 U. S. C. 1, *et seq.*:

Section 1(6) ... 41

Section 22 ... 46

Lend-Lease Act (Act of March 11, 1941), 55 Stat. 31, 22 U. S. C. 411, *et seq* ... 2

Transportation Act of September 18, 1940:

Section 321(a), 49 U. S. C. (1940 Ed.) 65(a) ... 3, 12, 23, 24, 29, 30, 32, 34

Section 322, 49 U. S. C. 66 ... 2, 11, 13, 15, 17, 19

Tucker Act, 24 Stat. 505, as amended, 28 U. S. C. 1346(a) (2) ... 1

In the United States Court of Appeals for the Ninth Circuit

No. 15852

UNITED STATES OF AMERICA, APPELLANT

v.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, A CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment and amended judgment in favor of the Spokane, Portland and Seattle Railway Company in eight consolidated actions brought by it to recover sums allegedly due in connection with transportation services rendered to the United States. The jurisdiction of the United States District Court for the District of Oregon was invoked under the Tucker Act, 28 U. S. C. 1346 (a) (2) (R. 7). The judgment was entered on August 26, 1957, and the amended judgment on September 17, 1957 (R. 64–65). Notice of appeal was filed on October 21, 1957 (R. 65–66). The jurisdiction of this Court is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

This action involves the charges of the appellee rail carrier for the transportation, between 1942 and 1945, of shipments of government-owned industrial equipment and supplies to Columbia River ports in Oregon for exportation to the Union of Soviet Socialist Republics (R. 6). These shipments were made on Government bills of lading from eastern, midwestern and western points in the United States for the account of the Procurement Division of the Treasury Department (R. 6). That Department had procured the materials, and authorized their shipment to the U. S. S. R., under the provisions of the Lend-Lease Act [1] and pursuant to requisitions received from duly authorized officials of the Soviet Government Purchasing Commission in the United States (R. 6).

Appellee as the terminal carrier and collection agent for all connecting carriers, rendered bills for this transportation (R. 6). As is required by Section 322 of the Transportation Act of 1940, *infra*, p. 13, these bills were paid "upon presentation * * * prior to audit or settlement by the General Accounting Office" (R. 6–7).

On the post-payment audit of the bills contemplated by Section 322, the Comptroller General found that the Government had been overcharged. With respect to a portion of the shipments, the audit disclosed that the Government had been entitled to land-grant deductions and that, therefore, appellee had improperly computed its charges on the basis of the

[1] Act of March 11, 1941, 55 Stat. 31, 22 U. S. C. 411, *et seq.*

full commercial rate (R. 7). As to the shipments made under 22 specified bills of lading (which are listed in Exhibit 32) the Comptroller General determined that appellee's bills should have been based on the rates published in the relevant export tariff, rather than on the higher rates published in the domestic tariff.

Appellee was requested to refund the amount of the administratively determined overpayment (R. 7). When this request was not honored, it was deducted in the payment of subsequent bills rendered by appellee, as expressly authorized by Section 322 (R. 7).

These actions were then brought under the Tucker Act to recover the deductions (R. 7). By agreement of the parties, approved by the District Court, the land-grant deductions and export rate issues were severed for the purposes of trial (R. 13).[2] Because these issues are essentially unrelated, they will be separately treated throughout this brief.

1. *Land-Grant Deductions.* The single question on this aspect of the case was stipulated to be whether the shipments involved were "military or naval property of the United States moving for military or naval and not for civil use," as that phrase was employed in Section 321 (a) of the Transportation Act of 1940, *infra,* p. 12 (R. 13). If so, the Government was entitled to land-grant deductions; if not, the carrier was entitled to charge the full commercial rate. Each party contended that the burden of proof on this question was on the other (R. 16, 19).

---

[2] The other issues referred to in the pretrial order were settled without submission to the court.

A substantial portion of the evidence submitted to the court on this issue was documentary in character (R. 21–26). Of particular relevance was a schedule (denominated Exhibit "A") which, as to each shipment, showed, among other things, the nature of the property transported and the statements contained in the covering requisition with respect to the intended use by the Soviet Union (R. 28–37).[3]

The schedule indicated, and the District Court so found, that the property fell into these broad categories: (1) petroleum refineries and machinery for the oil industry; (2) lunite hydraulic cement; (3) electric generators, generator sets, diesel engines and generating stations; (4) electrical power plants and equipment for hydro-electric power plants; (5) equipment for steel mills; (6) equipment for oil drilling and coal mining; (7) caustic soda; and (8) bunker coal for use in Soviet vessels (R. 28–37, 58–59).[4]

The schedule also showed that the requisitions on their face had reflected an intended military use for all of the shipped property (R. 28–37). Each requisition form contained either or both: (1) a notation, following the word "use" on the form, such as "War industry-U. S. S. R.", "Army (U. S. S. R.)", "For army and air force, U. S. S. R.", and "Used in military plants—U. S. S. R.": and (2) a more detailed statement of intended use, such as "[t]his equipment

---

[3] Certified copies of the requisitions themselves were also introduced in evidence (R. 21–24).

[4] A ninth category, equipment to be used at Soviet Arctic bases, is not involved on this appeal and therefore will not be discussed.

is for use in mining raw materials for the U. S. S. R. war industries'' (R. 28–37).

In addition to the documentary evidence, the Government produced two witnesses on the matter of the intended use of the shipments. The first, Harry F. King, was a petroleum engineer who had been the assistant superintendent of the Sun Oil Company refinery at Marcus Hook, Pennsylvania until December 1943, when he had become Chief of the Process Section of the Petroleum Administration for War (R. 112). While in private employment, he had worked closely with Russian petroleum engineers and technicians sent to this country during the early part of World War II to study the refining processes for the manufacture of high octane gasoline used in military aircraft, and had discussed with these individuals the use to be made of the refineries which the Soviet government was endeavoring to obtain from the United States (R. 113–116). While with the Petroleum Administration for War, his duties had included the acquisition of a detailed knowledge of every aspect of the intended operation of these refineries (R. 117–119).

On the basis of his acquaintanceship with the Russian petroleum industry and its needs, and of his examination of the exhibits in evidence, King testified unequivocally that the refinery equipment here involved was intended for military use (R. 119–126). Among other things, he pointed out that the refineries were specially designed for the production of the kind of high octane aviation gasoline and aviation lubri-

cating oil which was employed by military aircraft alone;[5] and that the diesel fuel by-product of the operation of the refineries was to be employed by the army in its land operations (R. 123–126).

Turning then to the shipments of caustic soda, King discussed the prominent role that that commodity played in the refining of petroleum (R. 127). He estimated that the operation of the refineries which had been requisitioned for aviation gasoline production would require between 20 and 25 thousand tons of caustic soda annually (R. 127). He referred also to the significance of this commodity in the reclamation of used rubber (R. 127–128).

King's testimony was buttressed by that of the Government's second witness, Brigadier General Philip R. Faymonville.[6] A Regular Army officer with considerable experience in logistics, Faymonville had served several tours of duty in the Soviet Union between the two world wars (R. 70–76). From 1934 to 1939 he had been the military attache of the American Embassy in Moscow and, in the furtherance of his duties, had compiled and submitted to the War Department voluminous reports on Russian industrial production for military purposes (R. 76–78).

In September 1941, Faymonville had proceeded again to the Soviet Union as a member of the Harriman Commission, the specific purpose of which was

---

[5] King noted that the refineries were adapted to the production of 100-octane gasoline and that, during the war, civilian transport planes were using 91-octane gasoline (R. 131).

[6] Because of his illness, Faymonville's testimony was received in deposition form (R. 133).

to determine the scope of Russian military needs in the common effort against the Axis powers (R. 78–80). When the Harriman mission returned to the United States the following month, he had remained behind and had served for over two years as the Chief of the American Supply Mission to the U. S. S. R. (R. 80). In that office, he had studied and continually discussed with Soviet officials, including Molotov and the Soviet Commissar for Foreign Trade, specific industrial projects essential to the prosecution of the war (R. 80–84).

With respect to the use to be made of the requisitioned petroleum refineries, Faymonville observed that the production of aviation gasoline not only was given high priority by the Soviet Government, but also "had a bearing on certain strategic plans of the United States in case we succeeded in basing American aircraft on Soviet soil for use in the Balkans or elsewhere against the German armies" (R. 88). Further, he pointed to the fact that petroleum products were not being manufactured by the Soviet Union in sufficient quantities to satisfy even the needs of its army and air force and, therefore, none were available for non-military purposes (R. 101).

Faymonville also discussed the intended use of most of the other shipments. The hydro-electric power plants and equipment, for example, were requisitioned as part of the program established to furnish electricity needed in the manufacture of munitions for the Soviet armed forces (R. 86). The mobile power stations were to be employed by the Soviet army in regions evacuated by the Germans; as Faymonville

noted, power was required to rehabilitate such essential facilities as railway switching yards, supply bases, and prisoner of war compounds (R. 86–87). And one of the important functions of the supply bases was the salvaging of tanks and other war equipment (R. 87–88).

Insofar as the steel mill equipment was concerned, Faymonville testified that it, too, was to serve in the furtherance of the manufacture of munitions, tanks, and other implements of war (R. 96–97, 102–103). Apropos of the bunker coal requisitioned for use in Soviet vessels, he made the observation that "[s]eaborne commerce for any purpose other than the carrying on of the war or the bringing in of supplies to directly support the movements of armies was an unknown thing" (R. 102).

On September 8, 1956, the District Court, per Circuit Judge James Alger Fee (sitting by special designation), filed an opinion in which it held that, despite the Government's evidence, none of the shipments involved on the appeal were entitled to land-grant deductions (R. 38–40). The ruling was based principally on this consideration (R. 39–40):

> There is very little indication in the record that any of this property ultimately was used on or near the battleground or that any of the products of any of the machinery ever were devoted to use against the common enemy. The government did not prove that any single article shipped or any single article or product of these machines actually was devoted to a war use. It might even have been surmised that

> some of the aviation gasoline manufactured by these munitions plants was used in Korea after World War II ended. But, in any event, none of the articles, machinery, or coal used in the Soviet vessels was "military or naval property of the United States."

On August 26, 1957, following the trial on the severed export rate issue (to be discussed below) Judge McCollough filed findings of fact and conclusions of law on both issues (R. 51–63). In accordance with Judge Fee's opinion, Judge McCollough found (R. 59–60):

> There is very little indication in the record that any of the property [here involved] ultimately was used in or near the battleground or that any products of any of the machinery ever were devoted to use against the common enemy. Defendant did not prove that any single article shipped or any single article or product of these machines actually was devoted to a war use.

2. *Export Rate.* It was stipulated by the parties that the sole question on this phase of the case was whether the Government had complied with the condition in Item 270 (a) of Trans-Continental Freight Bureau Export Tariff No. 29-Series that "[r]ates authorized apply only to export traffic when specific destination beyond Pacific Coast port of export is shown in bill of lading or shipping receipt issued at the time of shipment * * *" (R. 42, 46). Appellee conceded that all of the other conditions and restrictions pertaining to the application of the export tariff had been met by the Government (R. 43).

Following their arrival at the Pacific Coast port of exportation, every one of the shipments had been transported by ocean carrier to areas in the Soviet Union west of the 170th Meridian, West Longtitude, and east of the 30th Meridian, East Longitude (R. 44). In each instance, the bill of lading had listed the destination of the shipments as "U. S. S. R." (R. 47).

The Government's position was that the "U. S. S. R." notation was a showing of "specific destination" within the meaning of Item 270 (a) (R. 48). In support of this position, it demonstrated (in part through the testimony of an expert witness) the following: The tariff on its face applied to rail shipments of these specific commodities moving to the Pacific Coast ports here involved and destined for shipment therefrom by ocean common carrier to points west of the 170th Meridian, West Longitude, and east of the 30th Meridian, East Longitude (R. 41). Since all Soviet ports to which the shipments could have been exported are within this area, the notation "U. S. S. R." enabled appellee to determine that the rates and charges provided in the export tariff were applicable (R. 149–150). Therefore, the addition of a designation of the port or ports within the Soviet Union to which the shipments were destined would not have provided appellee with any further relevant information (R. 150).

Without disclosing his reasoning, Judge McCollough ruled, however, that the "notation 'U. S. S. R.' * * * on each of [the] bills of lading was not a

showing of specific overseas destination," and that there had been a failure of compliance with a condition in the export tariff (R. 62). On the basis of this ruling, he concluded that the Government had "failed to establish" that it was entitled to the export rate (R. 63).

On August 26, 1957, judgment was entered in favor of appellee in the amount of $30,997 (which the parties had agreed appellee was entitled to on the basis of the Court's determination on the two issues) (R. 64). On September 17, 1957, an amended judgment was entered, providing for interest on the principal amount of the judgment "to the extent authorized by law" (R. 64). This appeal followed (R. 65–66).

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in holding that, in a suit to recover deductions made by the Comptroller General under the authority of Section 322 of the Transportation Act of 1940, 49 U. S. C. 66, the Government has the burden of disproving the correctness of the carrier's charges which occasioned the deductions.

2. The District Court erred in holding that the Government's entitlement to land-grant deductions was dependent upon whether the transported property, or the products thereof, "actually [were] devoted to a war use."

3. The District Court erred in not holding that the Government's entitlement to land-grant deductions was dependent upon whether, at the time of its rail

Following their arrival at the Pacific Coast port of exportation, every one of the shipments had been transported by ocean carrier to areas in the Soviet Union west of the 170th Meridian, West Longtitude, and east of the 30th Meridian, East Longitude (R. 44). In each instance, the bill of lading had listed the destination of the shipments as "U. S. S. R." (R. 47).

The Government's position was that the "U. S. S. R." notation was a showing of "specific destination" within the meaning of Item 270 (a) (R. 48). In support of this position, it demonstrated (in part through the testimony of an expert witness) the following: The tariff on its face applied to rail shipments of these specific commodities moving to the Pacific Coast ports here involved and destined for shipment therefrom by ocean common carrier to points west of the 170th Meridian, West Longitude, and east of the 30th Meridian, East Longitude (R. 41). Since all Soviet ports to which the shipments could have been exported are within this area, the notation "U. S. S. R." enabled appellee to determine that the rates and charges provided in the export tariff were applicable (R. 149–150). Therefore, the addition of a designation of the port or ports within the Soviet Union to which the shipments were destined would not have provided appellee with any further relevant information (R. 150).

Without disclosing his reasoning, Judge McCollough ruled, however, that the "notation 'U. S. S. R.' * * * on each of [the] bills of lading was not a

showing of specific overseas destination," and that there had been a failure of compliance with a condition in the export tariff (R. 62). On the basis of this ruling, he concluded that the Government had "failed to establish" that it was entitled to the export rate (R. 63).

On August 26, 1957, judgment was entered in favor of appellee in the amount of $30,997 (which the parties had agreed appellee was entitled to on the basis of the Court's determination on the two issues) (R. 64). On September 17, 1957, an amended judgment was entered, providing for interest on the principal amount of the judgment "to the extent authorized by law" (R. 64). This appeal followed (R. 65–66).

SPECIFICATION OF ERRORS RELIED UPON

1. The District Court erred in holding that, in a suit to recover deductions made by the Comptroller General under the authority of Section 322 of the Transportation Act of 1940, 49 U. S. C. 66, the Government has the burden of disproving the correctness of the carrier's charges which occasioned the deductions.

2. The District Court erred in holding that the Government's entitlement to land-grant deductions was dependent upon whether the transported property, or the products thereof, "actually [were] devoted to a war use."

3. The District Court erred in not holding that the Government's entitlement to land-grant deductions was dependent upon whether, at the time of its rail

movement, the transported property was destined to serve military or naval needs.

4. The District Court erred in not holding that the shipments here involved were "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act of 1940, 49 U. S. C. (1940 Ed.) 65 (a).

5. The District Court erred in not holding that, in the circumstances of the case, the notation on the bills of lading that the shipments were destined for exportation to the "U. S. S. R." constituted compliance with the condition in the export tariff that the "specific destination beyond Pacific Coast port of export" be shown.

6. The District Court erred in holding that the United States had "failed to establish" that it was entitled to the export rate.

7. The District Court erred in entering judgment for appellee.

STATUTES INVOLVED

1. During the period relevant to this litigation, Section 321 (a) of the Transportation Act of September 18, 1940, 54 Stat. 954, 49 U. S. C. (1940 Ed.) 65 (a), provided in relevant part that the full applicable commercial rates were to be paid for transportation by any common carrier of property for the United States with the exception of "military or naval property of the United States moving for military or naval and not for civil use * * *." This exception was removed by the Act of December 12,

1945, 59 Stat. 605, effective October 1, 1946. The latter statute provides, however, that "any travel or transportation specifically contracted for prior to [the] effective date shall be paid for at the rate * * * in effect at the time of entering into such contract of carriage or shipment."

2. Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U. S. C. 66, provides as follows:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

ARGUMENT

Introduction and summary

In the court below, appellee insisted that the burden was on the Government to prove that the deductions made by the Comptroller General were justified; *i. e.,* to disprove the correctness of appellee's charges (R. 16, 47–48). Placing total reliance on this theory, appellee introduced no evidence whatsoever on the question as to whether the shipments were "military or naval property of the United States moving for

military or naval and not for civil use" and thus entitled to land-grant deductions.

For its part, the Government urged that the burden was on appellee to prove that its bills for the transportation of the lend-lease property were correct, and that, therefore, the deductions were improper (R. 19, 49). Unlike appellee, however, the Government nevertheless went forward with evidence on both the land-grant and export rate issues.[7] With respect to the former, it showed that at the time of rail movement (and at all subsequent times) the property was intended for either (1) use by the Soviet armed forces in the conduct of World War II or (2) use in the production or transportation of electricity, petroleum, munitions and other implements of war for those armed forces and essential to their operations. With reference to the export rate issue, it was shown that the notation "U. S. S. R." on the bills of lading provided appellee with all the information that the "specific destination" condition in the export tariff was designed to afford the carrier and that, as a conse-

[7] The Government recognized that, even though it did not have the burden of proof, it might be expected to come forth with all the factual information in its possession with regard to the nature of the shipments and the purpose for which they were moving. Because of this recognition, it placed before the court below both the relevant requisitions of the Soviet Government Purchasing Commission and the testimony of two witnesses who were particularly qualified on the matter of the use to be made of the property by that government. It, of course, cannot be said that, by thus going forward with its own proof despite the complete lack of any evidence on appellee's part, the Government abandoned its consistent position that the ultimate burden of persuasion was on appellee.

quence, the notation represented full compliance with that condition.

Accepting appellee's argument that the burden of proof was on the Government, the court below held that it had not been met. On the land-grant issue, the court took the test to be whether "any of this property ultimately was used in or near the battleground or * * * any of the products of any of the machinery ever were devoted to use against the common enemy" (R. 39). Applying this test, the court ruled in appellee's favor on the ground that "[t]he Government did not prove that any single article shipped or any single article or product of these machines actually was devoted to a war use" (R. 39). And, on the export rate issue, the court—without discussing the Government's evidence or stating what it deemed to be the governing criteria—concluded that the United States had "failed to establish" that it was entitled to the export rate (R. 63).

1. In Point I below, we show that the recent decision of the Supreme Court in *United States* v. *New York, New Haven and Hartford R. Co.,* 355 U. S. 253—taken alone—requires a reversal on both issues. In the *New Haven* case, the Supreme Court was called upon to decide the precise burden of proof question that underlies this case; indeed, that was the only question that was before the Court. Rejecting the contention which appellee makes here, the Supreme Court expressly held that, in a suit to recover amounts deducted under Section 322 of the Transportation Act, the carrier must prove the correctness of the charges challenged by the Comptroller General on the post-

audit; in other words, must prove that the deductions made on the basis of that audit were not warranted.

We do not think appellee will be heard to assert that it sustained the burden of proof which, by virtue of the *New Haven* decision, rested upon it. In any event, since appellee introduced no evidence—in the mistaken belief that the burden was on the Government—any such contention necessarily would fail.

2. In Point II we show that, apart from the matter of the improper assessment of the burden of proof, the determination of the court below on the land-grant issue was erroneous. It is settled under decisions of the Supreme Court, this Court and other courts that the critical inquiry is not, as the court below thought, whether the shipped property, or the products thereof, *actually* reached a battleground or were otherwise directly employed against the enemy. Rather, the relevant criterion has always been whether, at the time that the rail shipment took place, the property was *intended* for a military or naval use. And, measuring the evidence adduced below by the Government against the standard adopted in those cases for ascertaining what constitutes such a use, there can be no doubt that the transportation of the property here involved was subject to land-grant deductions.

3. In Point III, we demonstrate that there is no greater justification for the holding below that the notation "U. S. S. R." on the bills of lading did not constitute a showing of a "specific destination" within the meaning of Item 270 (a) of the export tariff. Since the tariff nowhere defines "specific destination," the meaning of that phrase necessarily must be deter-

mined by reference to the purposes which, according to the Interstate Commerce Commission, the condition was intended to serve. As the evidence reflects, the "U. S. S. R." notation wholly fulfilled those purposes. In the final analysis, appellee asks this Court to hold that the Government is to be denied the export rate on export traffic moving to areas specified in the relevant export tariff solely because the bill of lading was not encumbered with superfluous data.

I. The holding below that the Government had the burden of disproving the correctness of appellee's charges is contrary to *United States* v. *New York, New Haven and Hartford R. Co.*, 355 U. S. 253

1. The question as to where the burden of proof lies in Tucker Act suits to recover deductions made under Section 322 of the Transportation Act, *supra*, p. 13, has now been definitively resolved by the Supreme Court. *United States* v. *New York, New Haven and Hartford R. Co.*, 355 U. S. 253, decided December 16, 1957. The situation in the *New Haven* case was procedurally identical to that here. During 1944, the rail carrier had transported shipments of naval property. Pursuant to Section 322, its bills for this transportation had been paid upon presentation, prior to audit. Subsequently, as in this case, the Comptroller General had determined that the carrier had overcharged the Government and, when its demand for refund was not honored, had deducted the amount of the overcharge in the payment of a bill rendered by the carrier for 1950 transportation services. The carrier then brought suit under the

Tucker Act, ostensibly on the 1950 bill, to recover the deducted amount. The District Court and the Court of Appeals both held (as did the court below) that the burden was on the Government to prove that the deductions were correct (*i. e.*, that the 1944 bills had been improperly computed). On this holding, both courts concluded that the carrier was entitled to judgment even though it had not offered any evidence on the controlling issue of fact.[8]

In an 8 to 1 decision, delivered by Mr. Justice Brennan, the Supreme Court reversed. Stating that the single question before it was whether "the carrier has the burden of proving the correctness of the 1944 bills, or the Government the burden of proving that it was overcharged," the Court observed at the outset [355 U. S. at 255]:

> Before enactment of § 322, the Government protected itself against transportation overcharges by not paying transportation bills until the responsible government officers, and, in doubtful cases, the General Accounting Office, first audited the bills and found that the charges were correct. When charges were questioned the carrier was required to justify them. If administrative settlement was not reached and the carrier sued the United States to recover the amount of the bill, no one questions that it was the carrier's duty to sustain the burden of proving the correctness of the charges. *Southern Pacific Co.* v. *United States,* 272 U. S. 445, 448.

---

[8] Unlike this case, the Government also had not introduced any evidence.

Section 322, however, required the payment of such bills "upon presentation * * * prior to audit or settlement by the General Accounting Office * * *" The audit procedures remained substantially the same as those in effect prior to the statute but the former means of protecting against overcharges—by not paying the bills until their correctness was proved—has, by force of the statute, been replaced by the method of collecting them from subsequent bills, under the right reserved by the section to the Government "to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier." We recently said in *United States* v. *Western Pacific R. Co.,* 352 U. S. 59, 74:

"* * * This right [to deduct overpayment from subsequent bills of the carrier] was thought to be a necessary measure to protect the Government, since carriers' bills must be paid on presentation and before audit."

Again at page 75:

"The fact that the Government paid the carrier's bills as rendered is without significance in light of § 322 of the Transportation Act, *supra,* requiring payment 'upon presentation' of such bills and postponing final settlement until audit."

Turning then to the legislative history of Section 322, the Court determined [355 U. S. at 257] that it fully supported "this interpretation of [the] section." It noted that [355 U. S. at 260]:

The conclusion is inescapable from this history that the Congress was desirous of aiding the railroads to secure prompt payment of their

> charges, but it is also clear that the Congress, and the railroads, contemplated that the Government's protection against overcharges available under the pre-audit practice should not be diminished. *The burden of the carriers to establish the correctness of their charges was to continue unabridged.* The carriers were to be paid immediately upon submission of their bills but the carriers were in return promptly to refund overcharges when such charges were administratively determined. The carrier would then have "to recollect" the sum refunded by justifying its bills to the agency or by proving its claim in the courts. The footing upon which each of the parties stood when controversies over charges developed was not to be changed. *The right of the United States to deduct overpayments from subsequent bills was the carriers' own proposal for securing the Government against the burden of having to prove the overpayment in proceedings for reimbursement.* [Emphasis supplied.]

The Court concluded [355 U. S. at 261–262]:

> * * * the Government's statutory right of set-off was designed to be the substantial equivalent of its previous right to withhold payment altogether until the carrier established the correctness of its charges. Thus the issue of overcharges, after the enactment of § 322, arises in a different way, but the differing procedures by which the issue is presented should not control the placement of the burden of proof. In effect the situation is that the railroad is suing to recover amounts which the Government initially paid conditionally, and then recaptured,

> under the § 322 procedure. *We therefore hold that the burden of the carrier to establish the lawfulness of its charges is the same under § 322 as it was under the superseded practice.* [Emphasis supplied.]

Less than a month later, the Fifth Circuit held that the *New Haven* case required the reversal of a judgment in favor of a carrier which, like the one before this Court, had been based on a determination that the burden was on the Government to disprove the correctness of the carrier's charges. *United States* v. *Missouri Pacific R. Co.,* 250 F. 2d 805, decided January 14, 1958. And because, in its view, the carrier had not established that the bills in issue had been properly computed (and that the Comptroller General's deduction was in error), the Fifth Circuit remanded with instructions to enter judgment for the Government.[9]

2. It follows that the court below erred in placing the burden on the Government with respect to the correctness of appellee's charges. As the *New Haven* case holds, appellee's obligation was no different than it would have been had the pre-1940 practice of auditing transportation bills prior to payment re-

[9] The factual issue in the *Missouri Pacific* case was whether a shipment of Government property weighed 9290 pounds (as claimed by the Comptroller General) or 35,300 pounds (as claimed by the carrier). In support of its claim, the carrier had put into evidence a correction way bill reflecting the higher figure. The Government had relied exclusively on the bill of lading notation of the lower weight. The Court of Appeals apparently regarded neither document as more persuasive than the other.

460771—58——4

mained in effect. Under that practice, as the Supreme Court pointed out, appellee would not have obtained payment of its bills computed on the basis of the commercial or domestic rates unless and until it proved a clear right to the application of those rates.

That appellee, in common with the carrier in the *Missouri Pacific* case, *supra,* did not meet its burden is equally plain. On the land-grant issue, the only evidence as to the character of the shipments was introduced by the Government—which, despite appellee's burden of persuasion, presented the court with all of the information at its disposal. As heretofore seen, that evidence reflected (1) that the Soviet Government had requisitioned the property for use by its armed forces and by those industries engaged in the manufacture of materials essential to the combatant operations of these armed forces; and (2) that the United States in honoring the requisitions, intended that the property be given that use. Appellee made no effort to rebut this showing and the record contains nothing to suggest that the property was destined to serve any other purpose.

True enough, the District Court thought that the actual use made of the property by the Soviet Union, and not the use intended at the time of the rail shipment, was the only relevant consideration (and thus, in effect, held that the Government's evidence was immaterial). While, for reasons to be developed below, we think this ruling to be erroneous, the fact remains that the record is equally devoid of anything which would support a finding that, following their

arrival at their ultimate destination, the shipments had been diverted to a "civil use" (as that term is used in Section 321 (a) of the Transportation Act) and thereby had lost their prior status as military property moving for a military use. And no such finding was made.

Appellee's lack of proof extended to the export rate issue as well. Appellee sat back and made no effort to refute the Government's evidentiary showing that the notation of destination on the bill of lading was sufficiently specific to afford appellee with all the information which the "specific destination" condition of the export tariff was designed to give it.

II. The undisputed evidence clearly establishes that the shipments were entitled to land-grant rates

We submit that the foregoing considerations, taken alone, require a reversal of the District Court's determination on the land-grant issue. Even if, however, the court below had been right in its view that the burden of proof was on the Government, appellee still would not have been entitled to recover. As we now show, the court's construction of Section 321 (a) of the Transportation Act is at variance with both the terms of the Section and its uniform prior judicial interpretation. Measured against the latter interpretation, the Government's evidence established that the shipments were entitled to land-grant deductions.

A. The critical inquiry under Section 321 (a) of the Transportation Act is whether, at the time of rail movement, the shipments were military or naval property intended for a military or naval use

As the Tenth Circuit observed in *Sonken-Galamba Corp.* v. *Union Pacific R. Co.,* 145 F. 2d 808, 812

(C. A. 10), it is a settled principle of transportation law that "the nature and character of each shipment *at the time tendered* determines its status for rate purposes [rather than] the use which may be subsequently made of the material. * * * Tariff rates cannot be applied retrospectively, neither can the character of the material be made to depend upon an independent investigation concerning its use after it has passed from the consignee of the shipper." [Emphasis supplied.]

In Section 321 (a) Congress carried this precise thought over into the area of land-grant deductions. Notwithstanding the contrary view of the court below (R. 39), the Section does not speak in terms of "military or naval property ultimately * * * used on or near a battleground" or employed in the manufacture of materials actually "devoted to use against the common enemy." The critical phrase in the statute is instead "military or naval property *moving for* military and naval and not for civil use." [Emphasis supplied.]

If, when delivered to the rail carrier, there is a *bona fide* intent that the shipment be put to military or naval use, it is clearly "moving for [such a] use." This is so irrespective of whether developments subsequent to the completion of the rail movement may interfere with the carrying out of that *bona fide* intent. By way of illustration, a rail shipment of munitions to a port of exportation for use in a foreign theater of operation might be destroyed by enemy action while in ocean transit, or for some similar reason might not

actually be employed in combat. We think it hardly could be seriously contended that, because of this consideration, the property while in rail transit, would be moving for a civil use.

These considerations were given express recognition in *Northern Pacific Ry. Co.* v. *United States,* 101 F. Supp. 29 (D. Minn.). There, the Government shipped quartermaster and ordnance material to salvage and redistribution centers. Following arrival at these centers, the goods were inspected and a certain portion reconsigned for naval and military use. The remainder was sold as army or navy surplus.

The carrier contended that the items which were disposed of as surplus had to be regarded as shipped for civilian use, and therefore as being not entitled to land-grant rates. Rejecting this contention, the court pointed out initially that the purpose of these shipments was to permit the fulfillment of the military responsibility of determining whether the property would be given a military or war surplus use; that it was fair to assume that the dominant purpose of the shipments was to salvage as much of the property as possible for military use; and that, insofar as was known at the time of the rail movement, all of it might have been allocated for such use. Thus, the court reasoned, "[n]one of the goods lost their military status until they were separated from military use after the shipment had ended and then allocated for civilian use."

Holding that "[t]he character and status of the shipment of military stores by common carrier should be determined at the time of the shipment," the court

referred to the above quoted language in the *Sonken-Galamba* case. It then stated [101 F. Supp. at 31]:

> The language [in Sonken-Galamba] was used with reference to the interpretation of an ordinary tariff rate and not to a situation under the land-grant statutes, but it is not inappropriate herein. In other words, there should be a definiteness and finality in the character of these goods at the time that they were transported, so far as the applicable rate is concerned, and that should not be dependent upon some future contingency. [The carrier's] theory of tracing the items in these shipments which were finally discarded and sold for civilian use and determining the commercial rate thereon illustrates and emphasizes the necessity of applying the rule above enunciated.
>
> *   *   *   *   *
>
> The "use" contemplated at the time and during shipment of these goods was not a civilian use. That was not the dominant purpose of the transportation. The primary purpose of the transportation [was the] examination of these goods by military and naval officials so that they might determine whether a part or all should be rehabilitated and reconsigned for military purposes. Such an object persuasively establishes that the shipments were made for military use as that term is used in the statutes. It is not necessary that all of the goods were in fact put to military use.

All of the other reported decisions are fully consistent with this analysis. In *Northern Pacific Ry. Co.* v. *United States,* 330 U. S. 248, 255, for example, the Supreme Court spoke in terms of the shipments hav-

ing been "*destined* to serve military or naval needs". [Emphasis supplied.] And in *United States* v. *Powell,* 330 U. S. 238, 247, decided the same day, the Court stated:

> It is sufficient here to say that the fertilizer was being transported for a "civil" use within the meaning of § 321 (a), since it was *destined for use* by civilian agencies in agricultural projects and not for use by the armed services to satisfy any of their needs or wants or by any civilian agency which acted as their adjunct or otherwise service them in any of their activities. [Emphasis supplied.]

In *Southern Pacific Co.* v. *Defense Supplies Corp.,* 64 F. Supp. 605 (N. D. Cal.), affirmed by this Court, *sub nom., Southern Pacific Co.* v. *Reconstruction Finance Corporation,* 161 F. 2d 56, the court observed (64 Supp. at 607):

> The words "military" and "naval" as used in the Act are descriptive adjectives. In context they may refer to property of the War or Navy Departments but they also properly and logically are descriptive, irrespective of ownership, or the nature of the property itself, with respect not merely to its tangible form and characteristics but as well * * * to the nature of its *contemplated* use. [Emphasis supplied.]

And in *Southern Pacific Co.* v. *United States,* 67 F. Supp. 966, 968, involving Lend-Lease shipments to China, the Court of Claims determined:

> That the shipments were not for "civil" use is quite certain and the plaintiff does not maintain that they were for "civil" use. The

> argument goes that they were for *disposition* to a foreign government, as distinguished from *use.* We are not impressed with this argument. The United States was deeply concerned as to their use, and it is manifest that the reason they were for delivery to the Republic of China was that they were to be *used* by the Chinese Army, that is, intended for military and not for civil use.

See also *Pennsylvania R. Co.* v. *United States,* 125 F. Supp. 233, 237 (C. Cls.) ("lend-lease requisitions show[ed] the intended use of the [property] to be for military purposes").

In no case that we have discovered was it intimated, let alone held, that the criterion is anything other than the contemplated use of the property. Indeed, as will be seen below, in *Southern Pacific Co.* v. *Reconstruction Finance Corporation, supra,* this Court determined that motor benzol, procured for stock piling purposes and intended for ultimate use in the production of aviation gasoline and synthetic rubber for the armed forces, was military property moving for military use even though a significant portion was actually employed in the manufacture of products used by civilians.

B. The shipments were military or naval property and were intended for a military or naval use

The question before the court below was thus whether, at the time of the rail movement, the shipments were "military or naval property of the United States" intended for a "military or naval and not for civil use." We submit that the record leaves no doubt

that the answer is in the affirmative. Accordingly, despite the error of the court below both in formulating the issue before it and in assessing the burden of proof, the Government is entitled to judgment without the conduct of further proceedings. Cf. *United States* v. *Missouri Pacific R. Co., supra*, p. 21.

1. In *Northern Pacific Ry. Co.* v. *United States*, 330 U. S. 248, the Supreme Court was called upon to determine whether the following shipments came within the exception to Section 321 (a): (1) copper cable for use in the installation of equipment for mine defense on a cargo vessel which was convertible into a military or naval auxiliary; (2) lumber to be employed in the construction of a government-owned munitions plant being built by civilian contractors under the supervision of the Army; (3) lumber destined for eventual use (following drying and milling) by a civilian contractor in the manufacture of floating bridges to be used by marines in training and combat; (4) bowling alley equipment to be installed at a naval air base in Alaska, for recreational use first by the civilian construction crew at the base and then by navy personnel; and (5) liquid paving asphalt to be used by a civilian contractor in constructing runways in Alaska for a Civil Aeronautics Authority program which had been approved as necessary for national defense.

Deciding that every one of these shipments was entitled to the land-grant rate, the Court first cast aside [330 U. S. at 252–254] the carrier's suggestion

(1) that shipments to civil agencies cannot be "military or naval property"[10] and (2) that the Section 321 (a) exception is confined to property for ultimate use directly by the armed forces. It then turned [330 U. S. at 254] to the contention that "none of the articles shipped * * * was military or naval, since they were not furnished to the armed forces for their use [but] were supplied * * * for manufacture and construction which are civilian pursuits." In the course of determining that this contention was equally lacking in merit, the Court gave this controlling definition to the statutory terms (330 U. S. 254–255):

> In general the use to which the property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. *Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many*

---

[10] "We see no merit in that suggestion. Section 321 (a) makes no reference to specific agencies of departments of government. The fact that the War or Navy Department does the procurement might, of course, carry special weight or be decisive in close cases. But it is well known that procurement of military supplies or war material is often handled by agencies other than the War and Navy Departments." [330 U. S. at 253.]

> *needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under § 321 (a).* The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property. *Southern Pacific Co.* v. *Defense Supplies Corp.,* 64 F. Supp. 605. Within the meaning of § 321 (a) an intermediate manufacturing phase cannot be said to have an essential "civil" aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling.[11] [Emphasis supplied.]

The Court went on [330 U. S. at 257]:

> [The carrier] also contends that § 321 (a) is a remedial enactment which should be liberally construed so as to permit no exception which is not required. Cf. *Piedmont & N. Ry. Co.* v. *Interstate Commerce Commission,* 286 U. S. 299, 311–312. But it is a familiar rule that where there is any doubt as to the meaning of a statute which "operates as a grant of public property to an individual, or the relinquishment of a public interest," the doubt should be resolved in favor of the Government and against the private claimant. *Slidell* v. *Grand-*

---

[11] Applying this test to the shipments before it, the Court concluded [330 U. S. at 255]:

"[T]here can be no doubt that the five types of property

jean, 111 U. S. 412, 437. See *Southern Ry. Co.* v. *United States,* 322 U. S. 72, 76. That rule has been applied in construing the reduced rate conditions of the land-grant legislation. *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 401; *Southern Ry. Co.* v. *United States, supra.* That principle is applicable here where the Congress, by writing into § 321 (a) an exception, retained for the United States an economic privilege of great value.

In *Southern Pacific Co.* v. *Reconstruction Finance Corporation, supra,* the shipments of motor benzol had been transported by the carrier for the account of

---

involved in the present litigation were "military or naval" property of the United States "moving for military or naval and not for civil use" within the meaning of § 321 (a). The lumber for the pontoons, the asphalt for the airfield, the lumber for the ammunition plant were used in Army or Navy projects directly related to combat preparation or to actual combat. Copper cable for the cargo vessel, though farther removed from that category, was well within the definition of "military or naval" property. It, too was a defensive weapon. Beyond that it was purchased by the Navy Department and consigned to one of its officers. It was supplied pursuant to Navy specifications; and the ship on which it was installed was being prepared for possible ultimate use by the Navy. The bowling alleys were also well within the statutory classification. The needs of the armed forces plainly include recreational facilities. The morale and physical condition of combat forces are as important to the successful prosecution of a war as their equipment. The fact that the bowling alleys were planned for initial use of civilian workers makes no difference. *It is the nature of the work being done, not the status of the person handling the materials, that is decisive. Supplies to maintain civilians repairing Army or Navy planes is a case in point. The dominant purpose of the project in this case was the same whether civilians or military or Navy personnel did the actual work.*" [Emphasis supplied.]

the Defense Supplies Corporation, which had purchased the commodity pursuant to a War Production Board recommendation that 50 million gallons be stockpiled for later allocation "for defense purposes." Each bill of lading was marked "For Military Use". 13.4 percent of the benzol was eventually used in the manufacture of rubber products sold for civilian uses pursuant to allocations made by the War Production Board. The remainder was employed in the manufacture of rubber products and 100 octane aviation gasoline sold to the Army and Navy.

In urging in this Court that the transportation of the benzol was not subject to the land-grant rate, the carrier stressed that the commodity was only a material from which, when used in conjunction with other materials, a finished war product was made. Additionally, it argued that the finished product became "military or naval property" only when subsequently acquired by the Army or Navy.

On the authority of *Northern Pacific,* this Court ruled that the land-grant rate applied. It pointed to the Supreme Court's determination that the asphalt shipment was "military or naval property" despite the fact that it was consigned to a civilian agency. Reference was also made to the observation in *Northern Pacific* that "[w]ithin the meaning of § 321 (a) an intermediate manufacturing phase cannot be said to have an essential 'civil' aspect when the products or articles involved are destined to serve military or naval needs" and that "[i]t is the dominant purpose for which the manufacturing or processing activity

is carried on that is controlling." Finally, this Court took note of the Supreme Court's admonition that Section 321 (a) is to be construed against the carrier.

Northern Pacific was also relied upon by the Court of Claims in *Chicago and Northwestern Ry. Co.* v. *United States,* 74 F. Supp. 943. That case involved coal, sulphur and lime which had been shipped to ordnance plants. The coal had been intended to be used in the production of heat, steam and hot water; the sulphur in the manufacture of smokeless powder; and the lime in treating and softening water necessary to the operations of a facility engaged in manufacturing small arms. Concluding [74 F. Supp. at 944] that "these shipments clearly fall within the purview of the decision and the test laid down in [*Northern Pacific*]," the Court of Claims observed that it could "see no substantial distinction between materials shipped for the construction of a plant for military or naval use and materials for the operation of such a plant."

In *Southern Pacific Co.* v. *United States,* 67 F. Supp. 966, the same court determined that it was of no moment that the property (motor vehicles and parts) was intended for lend-lease use by an ally, rather than for use by the United States.[12] Further, the court held that the designation "Army use" on the

---

[12] This determination is supported by *United States* v. *Powell,* 330 U. S. 238, involving lend-lease shipments of fertilizer to Great Britain. While the Supreme Court held that land-grant rates did not apply, that holding did not rest upon the fact that the fertilizer was to be used by an ally. See 330 U. S. at 243.

requisition furnished by the ally sufficiently established that the property was for military and not for civil use [67 F. Supp. at 968]:

> The requisitions, certified copies of which are in evidence, are on a form designated "Form 1." This form has a space calling upon the applicant to state whether the articles desired are for Army, Navy, Air, or Commercial use. The applicant designated them as for "Army use," and the requisitions were honored as submitted.
>
> The inevitable conclusion must be that the articles in transit were for military not for civil use.

See also, *Pennsylvania R. Co.* v. *United States,* 125 F. Supp. 233 (C. Cls.).

2. Like in the *Southern Pacific* case in the Court of Claims, virtually all the requisition forms relating to the property involved in this case expressly stated that the items were to be used by the Soviet armed forces or in a war industry. A substantial number of them elaborated upon the nature of that use.

We submit that these notations constituted at least *prima facie* evidence of an intended military use of the property and that, having offered no evidence to the contrary, appellee cannot be heard now to assert that the shipments were moving for some other use. *Southern Pacific Co.* v. *United States, supra,* 67 F. Supp. at 968. But were appellee right in its assertion (R. 16) that the notations of use were merely "competent evidence," its position would not be improved. The uncontradicted testimony of the Government's witnesses wholly substantiated the accuracy of the no-

tations. Further, that testimony dispels all possible doubt that the property "was destined to serve military or naval needs" within the meaning of the Supreme Court's *Northern Pacific* decision and was not, as appellee insisted below (R. 16), intended merely to strengthen and rehabilitate the over-all economy of the Soviet Union.[13]

On the basis of (1) his extensive knowledge of the Soviet petroleum industry and its needs and (2) an examination of the specifications which were introduced into evidence, King testified that the refinery equipment was particularly adapted for, and was intended for use in, the production of that type of high octane aviation gasoline and aviation lubricating oil which the Soviet Union was utilizing in military aircraft alone (R. 123–126, 131). King further testified that the diesel fuel by-product of the refining process was especially suited for use by the Soviet land army, which had become "somewhat Dieselized" (R. 124). On the same subject Faymonville, whose knowledge of the needs of the Soviet armed forces was probably as extensive as that of any other American official, testified both to the high priority that was given

---

[13] Appellee so argued in an endeavor to bring this case within *United States* v. *Powell*, 330 U. S. 238. In *Powell*, the Supreme Court held that the property was being transported for a "civil" use because, unlike the shipments in *Northern Pacific*, it was destined for use by civilian agencies in agricultural projects and not for use by the armed forces or by any civilian agency which serviced them in any of their activities. See p. 27, *supra*. As the discussion in the text of this brief shows, the property here involved was to be used either by the armed forces directly or by industries servicing their needs.

by the Soviet government to the refining of aviation gasoline and to the dire shortage of those petroleum products required in the prosecution of the war (R. 88, 101). He also discussed the bearing that aviation gasoline production had upon the Allied plan of undertaking to base American aircraft on Russian territory for attacks upon the common enemy (R. 88).

Thus, in the words of the Supreme Court, the refineries had an unmistakable "relation * * * to the military effort" of the Soviet Union. It was property which was to be used to "further [the] projects" of the Soviet "armed forces [and] adjuncts" and which was destined to serve "their many needs or wants in training or preparation for war, in combat * * *." In no essential respect can the use for which the refineries were transported be distinguished from the intended use of any of the articles involved in the *Northern Pacific* case. If anything, equipment which is shipped for, and necessary in, the production of fuel for military aircraft has a much more "dominant [military] purpose" than, to cite one example, bowling alleys for recreational use. And, the parallel between the refineries and the motor benzol involved in *Southern Pacific Co.* v. *Reconstruction Finance Corporation, supra,* is even more striking. The motor benzol, after all, had been shipped for precisely the same ultimate use—the production of aviation gasoline.

Caustic soda also was used extensively in petroleum refining, as well as in the reclamation of used rubber (R. 127). In the circumstances, it too can be readily analogized to the motor benzol (which played a part in rubber production in addition to petroleum refin-

ing). It can also be compared to the sulphur and lime shipped in the *Chicago & N. W. Ry. Co.* case, *supra,* for use in the manufacture of gun powder and small arms.

That the bunker coal was moving for an intended military use is seen from the fact that all Soviet seaborne commerce was employed in the direct support of the movement of armies (R. 102). It is noteworthy in this connection that, in *Northern Pacific,* the Supreme Court gave this answer to the carrier's assertion that the land-grant rate is confined to only property for ultimate direct use by the armed forces [330 U. S. at 253–254]:

> Under that view materials shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be "military or naval" property. We likewise reject that argument. Civilian agencies may service the armed forces or act as adjuncts to them. The Maritime Commission is a good example. *An army and navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function.* [Emphasis supplied.]

Cf. *National Carloading Corp.* v. *United States,* 221 F. 2d 81 (C. A. D. C.).

The hydroelectric power plants, the mobile power stations, and the steel mill equipment similarly were requisitioned in the furtherance of projects being

carried out to satisfy immediate military requirements. The hydroelectric facilities were to provide electricity for the operation of munitions plants (R. 86). The mobile stations were to supply power to facilities maintained by the advancing Soviet army (R. 86–88). The steel mill equipment was to produce munitions, tanks and other items which had a dominant, if not sole, military purpose (R. 96–97, 102–103).

III. The Government complied with the condition in the export tariff that specific destination beyond Pacific Coast port of export be shown

The remaining question in the case is whether, as to the shipments made under the twenty-two bills of lading listed in Exhibit 32, the Government was entitled to the rates published in Trans-Continental Freight Bureau West-Bound Export Tariff No. 29-Series. This tariff, which was in effect at all relevant times, established export commodity rates from designated points within the United States to Pacific Coast ports on traffic destined for shipment by ocean common carrier to points west of the 170th Meridian, West Longitude, and east of the 30th Meridian, East Longitude (R. 41).

The applicability of these rates was subject to compliance with numerous conditions and restrictions set forth in Items 235 and 270 (a) of the tariff (R. 41–42). The shipments could not leave the possession of the rail carrier until delivery to the ocean common carrier at the Pacific Coast port. They could not be diverted to another destination while in possession of the rail carrier. They could not be held at

the port of export or en route thereto on request of the shipper, owner or other interested party. The specific destination beyond the Pacific Coast port of export had to be shown in the bills of lading or the shipping receipts issued at the time of shipment.

It was stipulated by appellee that all of the shipments on the twenty-two bills of lading were in fact exported by ocean carrier to the Soviet Union and to a point or points therein west of the 170th Meridian, West Longitude, and east of the 30th Meridian, East Longitude (R. 44). It was further stipulated that there had been compliance with the first three of the aforementioned conditions and restrictions (R. 43).

The sole justification advanced by appellee for charging the higher domestic rate was that there had been a failure of compliance with the remaining condition, that the specific destination beyond the Pacific Coast port of export be shown (R. 43). In this connection, it took the position that the "U. S. S. R." notation which had been made on each bill of lading did not constitute a showing of "specific destination" for the purposes of Item 270 (a); that the Government lost the benefit of the export rate because the bill of lading did not show the port in the U. S. S. R. to which the shipments were in fact transported by ocean carrier (R. 47).

We submit that, in the context of this case, this construction of the "specific destination" condition is indefensible and that, since the traffic moved to points within the designated area and all conditions

were met, the Government was entitled to the export rate.

1. The term "specific destination" as used in Item 270 (a) is not defined anywhere in the tariff. Its meaning therefore must be ascertained by an inquiry into the purpose which the condition was intended to serve. Each condition precedent to the application of the export tariff necessarily was inserted in the tariff for a good and substantial reason—and not merely to harass shippers or to place technical pitfalls in the path of their entitlement to the export rate on export traffic which was bound for, and actually went to, the area specified therein. Unless construed in terms of that reason, the condition would clearly violate Section 1 (6) of the Interstate Commerce Act, 49 U. S. C. 1 (6). That Section imposes a mandatory duty on rail carriers "to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed * * *." It further provides that "every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful." [14]

There is another basis for reading undefined tariff conditions in light of their purpose. Since a tariff is a representation by the carrier that it will "furnish certain services under certain conditions for a

---

[14] If one of two or more alternative interpretations of a tariff will result in a violation of the Interstate Commerce Act, it must be avoided. *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U. S. 686, 691.

certain price,'' its terms must be given "that meaning which the words used might reasonably carry to the shippers to whom they are addressed.'' *Union Wire Rope Corp.* v. *Atchison, T. & S. F. Ry. Co.,* 66 F. 2d 965, 966–967 (C. A. 8), certiorari denied, 290 U. S. 686. Consequently, ''the definition [of a term in a tariff schedule] in any particular instance must depend upon the environment of the particular use * * *.'' *Id.* at 970. Otherwise stated, "[t]ariffs must be fairly and reasonably construed in the light of their general design and purpose, to best effect their object.'' *Boone* v. *United States,* 109 F. 2d 560, 562 (C. A. 6). Cf. *Carpenter* v. *Texas & New Orleans R. Co.,* 89 F. 2d 274, 277 (C. A. 5); *Chesapeake & Ohio Ry. Co.* v. *United States,* 1 F. Supp. 350 (E. D. Va.).[15]

2. As the District of Columbia Circuit observed in *United States* v. *Interstate Commerce Commission,* 198 F. 2d 958, 967, the conditions and restrictions in the export tariff are policing measures "designed to prevent shippers of domestic freight from obtaining the lower export rate by misrepresentation and chicanery.'' In the *War Materials Reparation Cases,* 294 I. C. C. 5, 43–44, the Interstate Commerce Commis-

---

[15] A corollary principle, equally well settled, requires that all reasonable doubt as to the meaning of a tariff provision be resolved in favor of the shipper. *United States* v. *Gulf Refining Co.*, 268 U. S. 542; *Southern Pacific Co.* v. *Lothrop*, 15 F. 2d 486 (C. A. 9); *Union Wire Rope Corporation* v. *Atchison T. & S. F. Ry. Co., supra; International Milling Co.* v. *Lowden*, 91 F. 2d 270 (C. A. 8); *United States* v. *Strickland Transportation Co.*, 200 F. 2d 234 (C. A. 5); *Willingham* v. *Seligman*, 179 F. 2d 257 (C. A. 5); *American Ry. Express Co.* v. *Price Bros.*, 54 F. 2d 67 (C. A. 5); *Raymond City Coal & Transportation Corp.* v. *New York Central Ry. Co.*, 103 F. 2d 56 (C. A. 6).

sion expanded upon the purposes to be served by these conditions and restrictions, with particular reference to that condition in Item 270 (a) which is in issue here:

> * * * The principal reason for requiring in item 270 that the oversea destination be shown by the shipper was that * * * the railroad required knowledge of the destination to identify the trans-continental traffic as in fact tendered for movement to such destination. The requirement that the destination be shown in billing at the time of shipment also helped to prevent the application of export rates to shipments that would move freely on the higher domestic rates. *There was no occasion to apply the lower export rates on a shipment forwarded to a Pacific port without knowing its ultimate disposition and only in anticipation of a sale, after arrival at the port, at some indefinite point in the Pacific area.* * * *
>
> *   *   *   *   *
>
> * * * The conditions of the item [270] were also considered essential to minimize or prevent delay and congestion, to keep track of the through movement, *to enable the assessment of the correct export rate, which varied according to particular areas of destination in the Pacific,* to facilitate compliance with United States customs and other Government regulations, including those of foreign countries, and to expedite handling through the port. [Emphasis supplied.]

The "U. S. S. R." notation clearly fulfilled all of these purposes. In the first place, since it informed the carrier that the shipments were moving to a des-

tination within the Soviet Union, it "prevented the application of export rates to shipments that would move freely on the higher domestic rates" to the extent that it would have if "Vladivostok" or some other port had been added.

More importantly, the undisputed evidence below shows that the notation enabled the carrier to assess the correct export rate. Although, as the Commission noted, the rate "varied according to particular areas of destination in the Pacific," the undisputable fact is that all Soviet ports to which the shipments could have been exported are west of the 170th Meridian, West Longitude, and east of the 30th Meridian, East Longitude. Consequently, as testified to by the Government's witness (R. 149–150), *all traffic moving for exportation to the Soviet Union from the Pacific Coast* was entitled to the rates published in Export Tariff No. 29–Series. That tariff, of course, prescribed the same rate on a given commodity irrespective of where in the area west of the 170th Meridian, West Longitude, and east of the 30th Meridian, East Longitude, the shipment may have been destined.

Similarly, the "U. S. S. R." notation was plainly sufficient to serve the other purposes alluded to by the Commission, such as the expeditious handling of the shipment through the port of export and the facilitation of compliance with governmental regulations. In this regard as well, appellee has not pointed to a single way in which its knowledge of the Soviet port would have been of assistance to it.

In short, as appellee tacitly concedes, the "U. S. S. R." notation provided all of the information which was contemplated by the specific destination condition in Item 270 (a) and which was required by appellee both for the computation of the appropriate charges and for all other relevant purposes. To have added the port in the Soviet Union to which the shipments were destined would have been simply to encumber the bill of lading with data which, from appellee's standpoint, was totally irrelevant.

This all assumes, of course, that the inclusion of the surplusage would have been consistent with existing security regulations. While we do not stress the point, the listing on the face of a semi-public document (such as a bill of lading) of the port of destination of a cargo of war material might well have placed the safe arrival of the cargo in jeopardy. Granting that this consideration would not have excused a failure to supply meaningful information to the carrier,[16] it assuredly has a bearing upon the construction which, in the circumstances, revealed by the record, is to be given to Item 270 (a).

3. The court below did not indicate the reasons which led it to the conclusion that, notwithstanding the foregoing, the notation "U. S. S. R." was not a showing of specific destination for the purposes of

---

[16] We do not suggest, for example, that the Government would have complied with the condition had the bill of lading not indicated that the shipments were destined for the Soviet Union. As heretofore seen, appellee needed that information in order to determine whether the rates specified in the export tariff were applicable.

Item 270 (a). It may be, however, that it was influenced by *Union Pacific R. Co.* v. *United States,* 132 F. Supp. 230 (C. Cls.). Appellee placed almost entire reliance on that case in urging that the Government was to be denied the export rate because the bill of lading did not reflect the port in the Soviet Union to which the shipments were destined (R. 137).

Union Pacific involved, *inter alia,* a group of shipments to Pacific Coast ports for exportation to the Soviet Union. A Section 22 Quotation offered by the railroads and accepted by the Government provided that, if there was non-compliance with any of the conditions of the export tariff, the Government would nevertheless receive the export rate but would not be given land-grant deductions.[17] If, however, there was compliance with the conditions, the Section 22 Quotation would become inoperative and the Government would be entitled to land-grant deductions in addition to the export rate.

In the Court of Claims, the carrier contended that the provisions of the Section 22 Quotation applied because there had been non-compliance with a number of the conditions of the export tariff. Respecting the condition here involved, the carrier made the same argument that appellee makes, *i. e.,* that the notation "U. S. S. R." was not a showing of specific destination.

In lengthy findings of fact, the Court of Claims accepted the carrier's position as to all of the alleged

[17] Section 22 of the Interstate Commerce Act, 49 U. S. C. 22, authorizes rail carriers to transport Government property at reduced rates.

instances of non-compliance with tariff conditions. Insofar as can be ascertained from those findings, however, the court gave little consideration to the "specific destination" matter. Of course, it had not been called upon to give *any* consideration to it (since the determination on the other conditions rendered academic the question of the sufficiency of the "U. S. S. R." notation).

In any event, this much is clear: the court made no endeavor to justify its finding (132 F. Supp. 248) that the "U. S. S. R." notation "did not show the specific overseas destination".[18] Assuming that the court was aware that the carrier did not need to know the port of destination within the Soviet Union, it did not offer an explanation as to why that port nevertheless had to be shown on the shipping documents.

In theses circumstances, we fail to see how appellee can seriously suggest that *Union Pacific* be taken as controlling. Surely, in view of the complete absence of any discussion of the question either in its findings or in its opinion, the Court of Claims' bare conclusion is of scant precedential value. And, for the reasons which have already been developed, we think it clear that that conclusion is wrong—at least as applied to this case. We stress again that no principle of tariff law of which we are aware permits, let alone dictates, the use of Item 270 (a) to deny the benefit of the export rates on these shipments solely because

[18] In its opinion, the court stated merely that [132 F. Supp. at 232]: "As set out in our findings, the defendant did not comply with a number of conditions in connection with Items 235, 270, 285 and 290 of [the tariff]."

the Government did not furnish the carrier with information of a wholly superfluous nature. Put another way, the "U. S. S. R." notation having been specific enough to apprise appellee of all that it needed to know, it must be taken to have constituted a showing of "specific destination." Any other construction of Item 270 (a) would render the condition patently unjust and unreasonable, and thus unlawful. See p. 41, *supra.*[19]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

George Cochran Doub,
Assistant Attorney General,
C. E. Luckey,
United States Attorney,
Alan S. Rosenthal,
Attorney, Department of Justice.

April 1958.

---

[19] (1) Appellee also relied below (R. 45–47, 138–140) on (1) a proposed change in the language of Item 270 (a) which would have added "or country" after "specific destination"; and (2) a 1944 change which deleted the word "specific". Insofar as the former is concerned, since the change was cancelled before it became effective, it is difficult to understand how it could serve as an aid in construing Item 270 (a) as actually written. Further, it would appear to have been intended to clarify the Item, rather than to alter its import.

The deletion of the word "specific" took place after the movement of the shipments in this case. In any event, we do not think that this change lends support to appellee's contention that "specific destination" always meant "port."

APPENDIX

Statement as to exhibits pursuant to subdivision 2 (f) of Rule 18 of this Court:

Exhibit No.	*Identified*	*Offered and received*
1–29 (inclusive)	21–26	110
30	26	([1])
31–33 (inclusive)	49	139
34–36 (inclusive)	49	140
A	6	6

[1] Exhibit 30 is the Faymonville deposition (R. 67–108). Pursuant to direction of the court, it was tendered for introduction into evidence after the trial proceedings had concluded. (R. 110, 134.)

U. S. GOVERNMENT PRINTING OFFICE: 1950